Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Writs of Certiorari to the Supreme Court of the State of Georgia

JOINT APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1 . . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

OFFICIAL GEORGIA CODE ANNOTATED:

SECTION 16-11-64(b)(8)

Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution.

SECTION 16-14-7(a)

All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state.

SECTION 16-14-7(f)

Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

RELEVANT DOCKET ENTRIES

Return of Indictment by Fulton County Grand Jury	Feb. 9, 1982
State's Motion to Close Hearing on Motions to Suppress Filed	June 14, 1982
Jury Empanelled and Excused for Duration of Suppression Hearing	June 21, 1982
Defendants' Motions to Suppress Filed	June 21, 1982
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Notice of Appeal Filed	Oct. 15, 1982
Decision of Georgia Supreme Court	June 1, 1983
Petition for Rehearing Denied	June 28, 1983
Petitions for Certiorari Filed	Aug. 26, 1983
Certiorari Granted	Nov. 7, 1983

WARRANT FOR SEARCH AND SEIZURE RESPECTING PETITIONER COLE (APPROVED JAN. 11, 1982)

STATE OF GEORGIA

County of Cobb

Affidavit and oral testimony having been given before me by Lt. F. L. Townley, Atlanta Bureau of Police Services, acting in his official capacity as an officer authorized to enforce the criminal laws of Georgia, that he has probable cause to believe that on the person of Clarence Cole and on the premises known as 2401 Roberts Drive, #3, Smyrna, in Cobb County, Georgia, and in adjacent buildings and vehicles on said premises and within the curtilage thereof, and in the possession and under the control of the aforesaid persons, there is now being concealed certain property, to wit: money; betting slips; lottery ribbons; lists of bettors; documents containing information related to gambling; computers and other information storage and retrieval devices; telecopiers and other facsimile reproduction devices; telephones and other related communication devices; radio frequency scanners and other radio communication devices, which things are subject to search and seizure as tangible evidence of the crimes of commercial gambling, communicating gambling information and keeping a gambling place, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person, premises and vehicles above described, and that the grounds for issuance of the search warrant are true; you are hereby commanded to search forthwith the person, premises and vehicles above described for the property specified, and to make the search at any time in the day or night, in so doing you are authorized to search any persons found in said premises or vehicle or who enter the same during the execution of this warrant, and if the property be found there to seize it, leaving a copy of this warrant and under oath to return this warrant, filing therewith under oath a written inventory of the property seized and to bring the property all before me or any court of competent jurisdiction without unnecessary delay and within ten (10) days of this date, as required by law.

Because evidence of the types sought and authorized herein to be seized, and the likelihood of its destruction, if notice of the search is given, the officers executing this warrant are hereby authorized to enter the aforesaid premises without giving the notice otherwise required by *Georgia Code Ann.* Sec. 27-308.

The officers executing this warrant shall have the authority to search other persons found in the premises to the extent authorized by *Georgia Code Ann.* Sec. 27-309, and, if those persons are named in the affidavit executed before this Court, or any of its attachments, the officers are authorized to search those persons as if they had been specifically named therein.

This 11th day of January, 1982, at 2:00 o'clock P.M.

/s/ DOROTHY A. ROBINSON

Judge, Superior Court, Cobb
Judicial Circuit

STATE'S MOTION TO CLOSE HEARING ON MOTIONS TO SUPPRESS (FILED JUNE 14, 1982)

[CAPTION OMITTED]

MOTION

Now comes THE STATE OF GEORGIA by the District Attorney for the Atlanta Judicial Circuit and files the within Motion and respectfully shows the court as follows:

1.

During the trial of the above-styled case, The State anticipates utilizing evidence derived from court-authorized electronic surveillance.

2.

Motions to suppress said evidence have been filed in the above-styled case and will be heard prior to or during the trial of same.

3.

During the hearing on the motions to suppress, The State, in order to validate the seizure of the evidence, must utilize evidence which may involve a reasonable expectation of privacy of persons other than those indicted in the above-styled case.

WHEREFORE, The State respectfully prays that any hearing on any motions to suppress evidence secured as a result of electronic surveillance, whether heard prior to or during the trial of the within case, in which evidence must be presented by The State, be closed to the public.

Respectfully submitted,

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

By: /s/ H. ALLEN MOYE

H. Allen Moye
Assistant District Attorney

/s/ BENJAMIN H. OEHLERT, III

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DEFENDANTS' MOTION TO SUPPRESS (FILED JUNE 21, 1982)

[CAPTION OMITTED]

MOTION TO SUPPRESS[*]

COME NOW the Defendants above-named, prior to trial, and move this Court to suppress the use of any intercepted wire or oral communications of the Defendants, or of any evidence discovered, learned, traced or in any manner derived therefrom, including the identity or testimony of any witnesses discovered as a result thereof, and any physical evidence seized during the execution of any search warrants issued subsequent to the interception of Defendants' conversations and/or flowing therefrom, in whole or in part; and for a further Order directing the return of all recordings and transcriptions of such interceptions, including copies; for an Order directing the return of any physical evidence seized as aforesaid; and for an Order proscribing the use of all such evidence, directly or indirectly, in any trial, hearing or other proceeding (except insofar as such evidence may be required in furtherance of this Motion) on the grounds that:

(1) The underlying affidavits submitted in support of the applications for the wiretaps conducted herein, and which are the object of this Motion, failed to allege sufficient facts which would authorize the issuing judges to conclude that there was probable cause to believe that any of the above-named Defendants were engaged in the criminal activity for which the Orders of authorization were sought.

(2) The applications failed to describe with particularity those whose conversations were to be intercepted, especially the above-named Defendants.

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* Motion of Guy Waller, Hudson Ashley, Sandra E. Ashley, Eula Burke, W.B. Burke, and Archie Thompson. The suppression motion filed by petitioner Cole was virtually identical. See p. 12a, below.

(3) The issuing judges did not satisfy themselves that the applicant for the warrant was himself aware of facts and circumstances of his own knowledge which were sufficient to lead a man of reasonable caution to believe that the above-named Defendants were engaged in committing the crime for which the Orders of authorization were sought.

(4) The issuing judges failed to satisfy themselves that there existed exigent circumstances which required issuance of Orders of authorization to conduct electronic surveillance.

In point of fact, as is routinely done in Fulton County, the issuing judges simply rubber-stamped the applications.

(5) The officers executing the warrants failed to make a meaningful return of the warrant to the issuing judges, setting forth with particularity and specificity how such warrants were used and employed and what was obtained thereby.

In point of fact, except for some superficial litany routinely set out in the returns, the issuing judges were not in any meaningful way made aware of what was discovered during the antecedent tap so that they might intelligently discharge their magisterial discretion as to the need, *vel non,* of any more electronic surveillance.

(6) Indeed, as is routinely done in Fulton County, the applicant resorted to the bootstrap phenomenon of one tap begetting another in the guise of probable cause, all with the compliant issuing judges' blessings.

(7) The issuing judges failed to discharge their solemn duty to supervise the tap during its execution, leaving to the unfettered discretion of the officers conducting the tap the decision as to how long to tap and what to seize.

(8) The issuing judges completely abnegated their duty and responsibility of apprising themselves as to whether the tap was being conducted properly, whether

the tap had achieved its objective, whether the minimization requirements of the statute and the constitution were being complied with.

(9) The complete failure of the issuing judges to oversee the taps resulted in a general search, indiscriminate and pervasive.

(10) None of the returns reflected that the electronic surveillance was terminated immediately upon the interception of the conversations or activities which were authorized to be overheard.

In point of fact, all of the taps were conducted for the full period authorized in the Order, without regard to whether the authorized objective had been attained. This, too, is routinely done in Fulton County.

(11) Information gathered during the taps and evidence derived therefrom were disclosed and published for an impermissible purpose without authorization from the issuing judges.

This, too, is routinely done in Fulton County.

(12) Evidence of crimes other than those authorized in the Orders of authorization was disclosed and published without prior judicial authorization.

(13) The evidence gathered during and after the taps was published and otherwise used in a manner not authorized by federal and state wiretap law.

This, too, is routinely done in Fulton County.

(14) The underlying affidavits submitted in support of the wiretap applications advertently failed to disclose to the issuing judges that the State already possessed sufficient evidence of the violation, by the targets of the applications, of the crimes under investigation, thereby violating the statutory and constitutional requirement that electronic surveillance not be resorted to absent exigent circumstances.

(15) The State did not disclose to the issuing judges the identity of those whose conversations had been intercepted.

(16) The allegations bearing on other investigative techniques were false, boiler-plate litany routinely used by the affiants in Fulton County, and were designed to deceive the issuing judges.

(17) The applications failed to identify all those whom the applicant knew to be using the facilities in question in the commission of the offenses under investigation.

(18) The authorizations issued subsequent to June 24, 1981 were spawned by evidence gathered in the June 24th authorization, which was facially deficient in its inception, in its execution and in the post-tap failure to make and file a sufficient return.

(19) None of the Orders of authorization required the officers conducting the tap to file with the issuing judges periodic reports showing what progress had been made toward achievement of the authorized objective and the need, if any, for continued surveillance.

In point of fact, all the Orders of authorization permitted the monitoring officials to conduct a general search without any judicial oversight.

(20) The interceptions were not made in conformity with the Orders of authorization in that all conversations were intercepted and recorded irrespective of whether they related to authorized objectives.

(21) The first application was based on false, stale and conclusory allegations.

(22) The physical searches and seizures conducted herein were exploratory and general and eventuated in

indiscriminate seizures of property not authorized to be seized, including the private papers of the Defendants.[1]

(23) Searches conducted under the authority § 26-3405(d)(2), Ga. Code[2] are violative of the Fourth and Fourteenth Amendments to the United States Constitution in that it authorizes unbridled seizures by the officers conducting the search without the interposition of judicial control or restraint.[3]

WHEREFORE, the Defendants respectfully pray that the relief prayed for herein be granted and that a hearing be held to divulge the facts herein.

Respectfully submitted,

/s/ HERBERT SHAFER

Herbert Shafer
Attorney for Defendants

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[1] Petitioner Cole specifically objected that "the search warrants were illegally executed in that the seizures were general and exploratory in that the executing officers illegally seized personal letters, bank books, personal papers, business papers, deeds to property, bills of sale to personal property, and numerous other items of evidence not permitted under the search warrants or under the laws of Georgia." Motion of Clarence Cole ¶ 26.

[2] Subsequently recodified as § 16-14-7(f).

[3] Petitioner Cole's motion asserted that O.C.G.A. § 16-14-7(f), in "permit[ing] law enforcement officers to make seizures of items and property without a writ of seizure, is unconstitutional and in violation of the rights of these defendants as protected by the Fourth and Fourteenth Amendments to the Constitution of the United States, in that it fails to impose any judicial restraints upon the law enforcement officers making the seizure and attempts to permit an unbridled seizure of the private property and private papers of citizens of Georgia." Motion of Clarence Cole ¶ 26.

TRANSCRIPT OF JUNE 21, 1982, HEARING ON STATE'S CLOSURE MOTION, FROM SUPPRESSION HEARING TRANSCRIPT, VOL. I, PP. 6-15

[p. 6] MR. MOYE: Yes, Your Honor. The third matter, Your Honor, is a motion that the state has filed, filed on the 14th of June to close the [p. 7] courtroom to these proceedings. This case is going to involve evidence of a most sensitive nature. The motion to suppress is going to of necessity involve the introduction of some evidence that will affect persons other than those presently on trial. Under Georgia Code Annotated Section 26-3004(k),[*] state has an obligation to prevent unnecessary publication involving persons who are not presently on trial in order that the evidence that is presently, that is going to be introduced might subsequently be introduced against these persons. I fear if I introduce this evidence, as I must in order to carry my burden during the motion to suppress, and if the courtroom is open, Your Honor, and publication is allowed to persons other than parties to this action and these proceedings, that the publication would taint the evidence and would preclude its subsequent use. There are some, this evidence will involve some who are indicted but are not on trial now, this evidence will involve some who are not indicted and if it is published in open court in the presence of persons not parties to this trial, it may very well be tainted. I cite as my authority, Your Honor, a case I'm sure Mr. Shafer is well familiar with and that is *Cox* versus *State,* 152 Georgia Appeals, involves, it [p. 8] was at headnote 3, where during the motion to suppress, Mr. Shafer himself made a motion to clear the courtroom of persons other than those parties to the proceeding and the Court of Appeals affirmed Judge Wofford's closing of the courtroom for the purpose of the motion to suppress itself.

THE COURT: Well, let me say this to you. That I have had experience with this wire tap statute on previous occasions. I'm fairly familiar with it, hopefully. It is a right tight statute. It is a right tight statute and it is true that if there is any

* Subsequently recodified as § 16-11-64(b)(8).

publication, it does taint relating to any other alleged offenders. Isn't any question about that. I think you will find in the case of *State* versus *Orkin* where there was a rather strong dissenting opinion respecting majority on this issue, quite candidly I though the dissent was right under those circumstances. But in any event, that is the law. If you plan to offer evidence, or if you are going to offer evidence that relates not only to those defendants not on trial but to other offenders, including I assume those that were involved in my granting of the motion for continuance the other day, that in my judgment insofar as they are concerned, it would amount to a publication and it would be tainted [p. 9] because of the publication. Now it is true insofar as offenders are concerned, that the defendants now on trial, if they were the only ones involved, the fact that you have been declared on trial and engaged in trial, that the law is pretty broad in that regard because it says any preparation and that would include any motions, what not, which would not taint insofar as they are concerned. Would not be tainted. The hearing on the motion wouldn't taint the trial in chief in the event the court overrules the motion. Under those circumstances. But I think it would taint respecting the others. Do you wish to be heard, Gentlemen?

MR. SMITH: If Your Honor please, I agree with the observation made by the State and I concur in Mr. Moye's request, particularly insofar as the hearing of the motions are concerned.

THE COURT: Well that is what I'm talking about, just the motions.

MR. SMITH: Now when it comes to the trial before the jury—

THE COURT: Now wait a minute. When it comes to the main trial, Mr. Moye, you're gonna run into a different situation.

MR. SMITH: I concur so far as the motion is [p. 10] concerned. I strenuously object to closing the courtroom. We insist on a public trial.

THE COURT: You're gonna run into a different situation then. The motion is one thing but when you get to the trial of the case in chief, I can't help what the rulings might be, the right to an open trial is paramount.

MR. MOYE: Your Honor, I well understand that. I think that the statute is sufficient to cover me in that regard. What I deem necessary to play during the trial of the case I don't think is unnecessary publication under the statute. But insofar as the motion—

THE COURT: Well, I agree with you totally on that. I think the motion is one thing but the trial in the case in chief is entirely different. In other words if I had to make a judgment between the right of an open trial and the question that the state now presents respecting the matter being tainted by reason of publication growing out of the trial of the case in chief before the jury, irrespective of the consequences, I would have to rule that the right of open trial is paramount.

MR. MOYE: I do not ask that the trial be closed Your Honor. I seek only during the motion to [p. 11] suppress hearing that the hearing be closed.

THE COURT: Do you wish to be heard?

MR. SHAFER: Yes, Your Honor. Mr. Moye says that the purpose of this is to avoid any unnecessary publication. Well there's been publication galore.

THE COURT: Now there might have been. But I can't make that judgment at this time.

MR. SHAFER: Well, in view of the unnecessary publication that has already been made and in view of my clients' constitutional rights to an open trial, we will not only not join in the motion, we oppose it vehemently and we insist on our constitutional right to an open trial.

THE COURT: Insofar as the motion is concerned?

MR. SHAFER: As far as every second of this trial.

THE COURT: Including the motion?

MR. SHAFER: Including the motion, yes, Sir.

THE COURT: All right.

MR. MOYE: Your Honor, as I understand the law, the right to a public trial is not unfettered, that it is in some respects within the discretion of the court. Of course, this court can close a courtroom to protect a witness as this court has done. [p. 12] This court has much discretion on the matter.

THE COURT: All right, Sir I'm gonna grant your motion, but I want it understood now when we reach, if we do reach the trial of the case in chief, you have got an entirely different situation if you reach that point.

MR. MOYE: If we reach that point Your Honor, I would have to make a new motion. This covers only the motion hearing right now.

MR. SHAFER.: Do I understand the court is going to close these doors and deprive my client of public trial?

THE COURT: Yes, Sir, on the motion.

MR. SHAFER: Respectfully except.

THE COURT: Anything further?

MR. MOYE: Your Honor, to what extent? Would that include all persons other than witnesses, necessary court personnel, parties and the lawyers to these proceedings right now?

THE COURT: Have to, have to.

MR. MOYE: Thank you, Your Honor. Should we post a bailiff at each door to protect this case?

THE COURT: Yes, Sir.

MR. SHAFER: I want a record, Your honor. I have here several people who are vitally [p. 13] important to me, since I have no law clerk, who need to be at my beck and call so that I can have them run errands, so I can give them instructions to make telephone calls, obtain witnesses for me and to do any and all of the myriad of (sic) things that an attorney needs to do in order to effectively render assistance of counsel. One of them is my secretary and my wife. Another one is Mr. Evans and that is all at the moment. And I respectfully ask that they be permitted to stay.

MR. MOYE: I have no objection, Your Honor, to Mr. Shafer's wife and secretary remaining. I do as to Mr. Evans. He is a party to a different set of proceedings, not to these proceedings at this time.

THE COURT: Is he a witness?

MR. MOYE: He's not a witness, he's not a party, he's not a lawyer.

THE COURT: What is his function? He's not an officer of the court.

MR. SHAFER: No, he's not an officer of the court. He's working for me. He's going to run errands for me.

THE COURT: Well, he can run all the errands you desire. Just speak to him out there in the hall. No problem about that. All right, Sir. Give him a chair out there so he'll be available in case you need [p. 14] him.

All right. Now, be sure and check to see if everybody is out.

(Whereupon the courtroom is cleared.)

THE COURT: Now who do we have left in the court room? Mr. Shafer's wife?

MR. MOYE: And Mr. Kimsey and Miss Nolan and they will be the state's first two witnesses.

THE COURT: Mr. Moye, I don't want to become involved but this statute on publication, is, as I have used the word very tight statute. And I think that means everybody must go except the defendants, counsel, necessary witnesses of course who appear, and the officers of the court.

MR. MOYE: Lt. Townley will be a witness and I'm simply asking that he be allowed to within the discretion of the court remain in the courtroom.

THE COURT: He'll be a witness?

MR. MOYE: He'll be a witness, yes, Your Honor. Mr. Kimsey and Mrs. Nolan will be witnesses and will be the state's first witnesses and I anticipate before we get into any of the

evidence that one of them will be sequestered and the other will be put on the stand and that beyond that, the state has no one else. I have even sent my investigator out of [p. 15] the courtroom.

THE COURT: All right.

MR. SMITH: If your Honor please. I'd like to interpose an objection to the two witnesses from the Clerk's office and also to Mr. Shafer's wife remaining in the courtroom.

THE COURT: I think you're right.

MR. MOYE: Mr. Shafer requested. I will consent to her remaining but if Mr. Smith wishes her out, then I will withdraw my consent.

THE COURT: I will grant the motion.

* * *

ORDER PARTIALLY OVERRULING DEFENDANTS' MOTIONS TO SUPPRESS (ENTERED JUNE 29, 1982)

[CAPTION OMITTED]

ORDER

The Motions to Suppress filed and on behalf of JASON BROWN, JOHN PAUL COUEY, LOUIS PATRICK NELSON, EARNESTINE PALMER, GEORGE W. SULLIVAN, ALMA ELIZABETH SULLIVAN, WILLENE TEAGUE, LUKE TEAGUE, GUY WALLER, HUDSON ASHLEY, SANDRA ASHLEY, EULA BURKE, W. B. BURKE, ARCHIE THOMPSON, HERSHELL HARPER, CLARENCE COLE, JERRY LAMAR COLE, LOUISE ALLEN, MARION LEWIS ALLEN, A. DICKIE ALLEN having come before this Court, and evidence and argument having been heard and considered by the Court, the Court enters the following Order:

The Amendments to the Motions to Suppress filed on June 28, 1982, after the joining of issue and without good cause having been shown, are ordered dismissed.

As to the documents contained in Defendant's Exhibits numbered 250 through 259, the Motions are granted.

As to all other evidence, the Motions are hereby denied.

SO ORDERED, this 29th day of June, 1982.

/s/ OSGOOD O. WILLIAMS

Judge, Superior Court
Atlanta Judicial Circuit

OPINION OF GEORGIA SUPREME COURT (ENTERED JUNE 1, 1983)

[CAPTION OMITTED]

CLARKE, JUSTICE.

Appellants and others were indicted and charged with violation of the Georgia Racketeer Influenced and Corrupt Organizations Act (OCGA § 16-14-1, *et seq.* (Code Ann. § 26-3401 *et seq.*)) and convicted of the offenses of commercial gambling and communicating gambling information. This appeal does not concern the sufficiency of the evidence except in regard to the question of venue.

The evidence at trial showed that appellants participated, with hundreds of others on a lower level, in a lottery ring which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange. The information was transmitted by telephone and telecopier and stored in a micro-computer maintained by appellant Cole.

(1) The basis of this court's jurisdiction is that appellant has made a facial attack on OCGA § 16-14-7(f) (Code Ann. § 26-3405) of the forfeiture provision of the Georgia Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO). The State argues that jurisdiction is not in this court because the constitutional challenge was not properly raised in the trial court and because appellants have no standing to raise the constitutionality of the forfeiture procedure since the evidence presented at trial was seized pursuant to search warrants. We find that the constitutional issue was properly raised at trial and that appellants have standing to raise it on appeal.

Appellants contend that the statute is unconstitutional because it authorize seizure of "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity" prior to filing a complaint for a RICO in rem forfeiture proceeding and prior to the obtaining of a writ of seizure. Appellants insist that this statute is on its face violative of the Fourth Amendment to the United States Constitution.

We find that the provision in question, OCGA § 16-14-7(f) (Code Ann. § 26-3405) is constitutional on its face. A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure or the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment. For a discussion of exigent circumstances, see *New York* v. *Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *Chimel* v. *California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.E.2d 685 (1969); *Warden* v. *Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.E.2d 782 (1967).

Seizure of contraband, evidence, or weapons not listed on a search warrant by an officer executing an arrest warrant or search warrant does not violate the due process clause of the Fourteenth Amendment even though there has been no notice and hearing. *Calero-Toledo* v. *Person Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.E.2d 452 (1974). See also *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.E.2d 556 (1972).

(2) The next question before us is whether the statute was applied in an unconstitutional manner as to appellants. According to appellants, officers acting under search warrants went far beyond the scope of the warrants in conducting general searches and seizing all manner of personal items including jewelry, letters, school report cards, unopened strong boxes and other items which were then sifted at leisure by the police in a search for evidence. Such items as were unlawfully seized were excluded from evidence at trial pursuant to a motion to suppress. It is appellant's contention that because certain property seized was outside the warrant, all of the

evidence should have been suppressed. Appellants rely on *Marron* v. *United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.E.2d 231 (1927), *United States* v. *LaVallee,* 391 F.2d 123 (2d Cir. 1968), and *United States* v. *Pinero,* 329 F. Supp. 992 (S.D.N.Y. 1971), in support of their position. In *Marron* v. *United States,* the Court held that under the Fourth Amendment a search warrant describing intoxicating liquors and articles for their manufacture did not authorize seizure of a ledger and bills of account. However, finding that the ledger and bills were seized incident to a lawful arrest, the Court affirmed the appellant's conviction. In *United States* v. *LaVallee* and *United States* v. *Pinero,* the warrant did not describe the items at issue. Since the search was not conducted under any exception to the warrant requirement of the Fourth Amendment, the items not described in the warrant were suppressed. These cases stand for the rule that evidence improperly seized is inadmissible. There is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted.

(3) Appellants contend that their convictions should be overturned because the term of court at which they should have been tried under their demands for a speedy trial had expired. OCGA § 17-7-170(b) (formerly Code Ann. § 271901) provides: "If the person is not tried when the demand is made or at the next succeeding regular court term thereafter, provided at both court terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation." For demand to cause the time to begin to run there must be a jury impaneled and qualified to try the defendant. *DeKrasner* v. *State,* 54 Ga. App. 41, 187 S.E.2d 402 (1936). Here the trial court found that there was no jury impaneled to try the case during the term in which appellants filed their demands. Consequently, the time allowed by the two-term trial requirement did not begin to run until the term following that during which the demand was filed. In the absence of clear and convincing evidence to the

contrary, we will not disturb the trial court's finding that no jury qualified to try appellants was impaneled during the term in which the demand was filed. *Wilson* v. *State,* 156 Ga. App. 53, 274 S.E.2d 95 (1980). See also, *State* v. *McDonald,* 242 Ga. 487, 249 S.E.2d 212 (1978).

(4) In their next enumeration of error appellants complain that the trial court erred in ordering the courtroom closed during the hearing on the motion to suppress. Appellants insist that this constitutes a violation of their rights under our holding in *R.W. Page Corp.* v. *Lumpkin,* 249 Ga. 576, 292 S.E.2d 815 (1982). In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power "... to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe* v. *State,* 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977). We find that appellants' Sixth Amendment right to a public trial was not violated. There is some question whether state or federal law would have required that the wiretap information be revealed only in a closed courtroom. OCGA § 16-11-64(b)(8) (Code Ann. § 26-3004); 18 U.S.C.A. § 2517. We need not reach this question since the thrust of appellants' argument is that the court failed to follow the procedure announced in *R.W. Page Corp.* v. *Lumpkin,* supra. This argument has no merit since the hearing in question occurred before that case was decided and before the procedural requirements set forth took effect.

(5) Appellants allege error in the admission of evidence gathered by electronic surveillance in counties other than Fulton County pursuant to warrants obtained in Fulton County and in the court's denial of appellants' motion to amend their motion to suppress to reflect facts in support of this allegation. Since we find that the amended motion to suppress was not timely made, we need not address the question whether the evidence should have been admitted. OCGA § 17-530 (former

Code Ann. § 27-313) provides that a motion to suppress the fruits of an unlawful search and seizure shall be in writing and state facts showing that the search and seizure was unlawful. Although there is no time limit set out in the statute for the filing of a motion to suppress, the statute has been interpreted as requiring that the motion be made before the issue is joined. *Perryman* v. *State*, 149 Ga. App. 54, 253 S.E.2d 444 (1979); *State* v. *Shead*, 160 Ga. App. 260, 286 S.E.2d 767 (1981). We interpret this to mean before the defendant enters his written plea. Although not controlling here, the federal wiretap statute provides that a motion to suppress the fruits of an illegal wiretap be made "... before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." 18 U.S.C.A. § 2518(10)(a).

In the present case the trial judge, after hearing, specifically found that the amended motion was made after issue was formally joined and without any showing of good cause. We find no error in the court's refusal to grant the motion to amend.

(6) Appellants assert that certain evidence which the state discovered through electronic surveillance pursuant to OCGA § 16-11-64 (Code Ann. § 26-3004) should not have been admitted in evidence because it had been disclosed to the Federal Bureau of Investigation, the Georgia Bureau of Investigation, the Organized Crime Prevention Council and the Internal Revenue Service. In support of this position, appellants point to OCGA § 16-11-64(b)(8) (Code Ann. § 26-3004), which limits the state's right to publish information obtained under an electronic surveillance warrant "other than that necessary and essential to the preparation of an actual prosecution for the crime specified in the warrant...." The section then mandates that should a prohibited publication occur, the published information may not be admitted into evidence.

The state counters with the argument that no violation occurred here because federal law authorizes this type information be disclosed to other investigative or law enforcement officers to the extent that such disclosure is appropriate to the

proper performance of the official duties of the officer making or receiving the disclosure. 18 U.S.C. § 2517(1). The state also cites *Morrow* v. *State,* 147 Ga. App. 395, 249 S.E.2d 110 (1978), *cert. denied,* 440 U.S. 917, 99 S.Ct. 1235, 59 L.Ed. 2d 467 (1979), and *Cox* v. *State,* 152 Ga. App. 453, 263 S.E.2d 238 (1979). In these cases the Court of Appeals held that the disclosure of such information to other law enforcement officers does not cause the information and evidence to be inadmissible.

In the case before us, the disclosure of the information was specifically authorized by a court order which cited both the state and federal statutes and listed the agencies to whom the disclosure could be made. The import of the order is that the superior court judge entering the order concluded that the sharing of information between law enforcement agencies was in fact necessary and essential to the preparation and actual prosecution for the crime specified in the warrant. In view of the fact that this prosecution is for violations of the statute aimed at organized crime, it is reasonable to find that organized efforts of law enforcement agencies are essential and necessary. This finding is supported by the clear language of OCGA § 16-14-2(b) (Code Ann. § 26-3401), which sets forth the intent of the General Assembly in enacting the RICO statute, to impose sanctions against "an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain." Our interpretation of the General Assembly's intent to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime is further borne out by a recent amendment to the RICO statute authorizing reciprocal agreements with the chief prosecutors of any jurisdictions having substantially similar statutes. OCGA § 16-14-10(b) (Code Ann. § 26-3409), Ga. L. 1982, p. 1385, § 12.

(7) Appellants' seventh, eighth, ninth and tenth enumerations of error deal with appellants' claim that the state used straw "co-defendants" as informants at trial in spite of appellants' written demand before arraignment that the state disclose such information. The conversations between investigative officers and the informants were recorded and reviewed by the trial judge, who found that the tapes corroborated the testi-

mony of the officers that no defense tactics were revealed and that no prosecutorial misconduct occurred. As the state points out, the only relief sought by appellants was disclosure of the informants. At the time of the hearing on the motion to suppress, the state indicated that the names of the informants had been disclosed and that the informants had been shown no special treatment. While we share the trial court's concern that the police tactics used here could lead to abuse, we find no error in his conclusion that no abuse of appellants' rights occurred in this case.

(8) Appellants complain that sworn oral testimony outside the affidavit was considered by the magistrate who authorized the wiretap. There is no merit to this enumeration since the magistrate issuing the search warrant may consider sworn oral evidence outside the affidavit to establish probable cause. *Simmons* v. *State,* 233 Ga. 429 211 S.E.2d 725 (1975); *Cox* v. *State,* 152 Ga. App. 453, 263 S.E.2d 238 (1979). See also 18 U.S.C.A. § 2518(2). We decline counsel's invitation, as did the Court of Appeals in *Cox,* supra, to adopt Rule 4(c), F.R.Cr.P. which requires recordation of sworn oral testimony.

(9) The contention that the court erred in limiting cross-examination of witnesses in the hearing in the motion to suppress is without merit. As the United States Supreme Court noted in *Aguilar* v. *Texas,* 378 U.S. 108, 109, n.1, 84 S.Ct. 1509, 1511, n.1, 12 L.E.2d 723 (1964). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." Although appellants also complain that the affiant was allowed to testify to the facts not in the affidavit, in fact, the record shows that affiants' testimony was limited to information presented to the magistrate.

(10) The trial court did not err in finding probable cause for the magistrate to issue the warrants despite certain mistakes of fact in the affidavit. There being sufficient information to support a finding of probable cause even discounting the mistaken information, the court did not err in finding that the affidavit was sufficient. *Franks* v. *Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.E.2d 667 (1978).

(11) Following a recess in the suppression hearing a witness stated that before proceeding with his testimony he needed to clarify testimony given earlier. He stated that the review of his investigative report and his affidavit during the recess "cleared my mind." Defense counsel asked if the report were available, and the witness replied that it was not, that it was in the possession of the district attorney. Defense counsel moved for production of the report, and the court denied the motion. Appellants argue that they were entitled to see the investigative report from which the witness refreshed his recollection.

The rule in Georgia is that even had the witness had the report before him on the stand, the defendant could not have procured the report as a matter of right simply by virtue of the fact that the witness used it to refresh his recollection. *Williams* v. *State,* 250 Ga. 664, 300 S.E.2d 685 (1963). "The defendant had no right to examine the witness' report which was used to refresh his memory and which was not in evidence." Id. at 665, 300 S.E.2d 685. See also *Jackson* v. *State,* 242 Ga. 692, 251 S.E.2d 282 (1978). It is true that this rule has been criticized as interfering with defendant's right to a thorough and sifting cross-examination. See dissent of Hill, C. J., *Williams* v. *State,* supra. However, in the present case, where the witness refreshes his recollection prior to taking the stand and has no notes in his possession, there can be no question that the state is under no greater compulsion to produce the report than if the witness had reviewed it before the trial began. In order for this report to be discoverable there must have been some reason other than the fact that it was reviewed by the witness.

(12) The enumeration of error regarding venue is deemed abandoned. Rules of the Supreme Court of the State of Georgia, Rule 45.

Judgment affirmed. All the Justices concur, except Hill, C. J., and Smith, J., dissent to division 3, Smith, J., dissents to division 5, Smith, J., and Weltner, J., dissent to division 6, Hill, C. J., and Smith, J., dissent to division 11.

Gregory, J., concurs in the judgment and concurs specially in division 11.

GREGORY, J., concurring specially. I concur in the judgment in this case and specially in division 11. Where a witness on the witness stand uses a writing or any other thing to refresh his recollection, it ought to be subject to examination by opposing counsel. See Chief Justice Hill's dissenting opinion in *Williams* v. *State,* 250 Ga. 664, 668, 300 S.E.2d 685 (1983). However, where the writing or other thing is not available in the courtroom access by counsel must depend upon the rules of discovery.

HILL, Chief Justice, dissenting. I dissent to division three (3) of the majority opinion. See *The State* v. *McDonald,* 242 Ga. 487, 489, 249 S.E.2d 212 (1978) (Hill, J. dissenting).

I also dissent to division eleven (11). See *Williams* v. *The State,* 250 Ga. 664, 668, 300 S.E.2d 685 (1983) (Hill, C. J., dissenting). There a minority of this court concluded that "... where a state's witness utilizes a report or other writing to refresh the witness' recollection, denying defense counsel the right to examine such writing constitutes a denial of the right of cross-examination." In my view, it makes no difference whether the witness uses the report to refresh his or her recollection while on the witness stand, or during a recess in the trial. The result is the same; the opposing party has been denied the right to a thorough and sifting cross-examination. This is particularly true where the district attorney shows the report to the witness, and the witness, with recollection thus refreshed, purports to "clarify" testimony given before the recess. The reference by the witness to the writing lends credibility to the "clarification," which opposing counsel is denied the opportunity to refute by reference to the writing. I therefore dissent.

I am authorized to state that Justice Smith joins this dissent.

NOTICE OF DENIAL OF MOTION FOR REHEARING (JUNE 28, 1983)

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 6/28/83

The motion for a rehearing was denied today:

Case No. 39385, *Waller et al.* v. *The State.*

Hill, C. J., Smith & Weltner, JJ., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk